

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





Docket No.

**77-1022**

**77-1023**

**77-1024**

To be argued by  
Jerome J. Niedermeier

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

BERNARD WOODMANSEE, SR.,  
JACKY E. DuBRAY and  
ROY M. HAMLIN

Appellants

Appeal from the United States District  
Court for the District of Vermont

BRIEF FOR THE UNITED STATES

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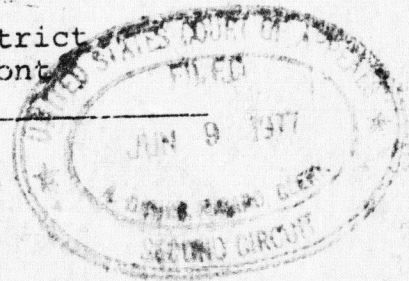


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IN THE  
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Appellee

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Appellants

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BRIEF FOR THE UNITED STATES

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STATEMENT OF THE CASE

Bernard Woodmansee, Sr., Jacky E. DuBray and Roy M. Hamlin appeal from judgments of conviction entered as to Woodmansee on December 6, 1976 and Hamlin and Du Bray on December 13, 1976, after a ten day trial before Honorable Albert J. Coffrin, United States District Judge, and a sequestered jury.

An indictment (DA 1-5),\* bearing criminal No. 76-38

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\* DA refers to Defendants' Appendix; other references are as follows: Tr. - Trial Transcript; DB1 - Defendant Woodmansee's Brief; DB2 - Defendant Hamlin's Brief; DB3 - Defendant DuBray's Brief; GA - Government's Appendix; GX - Government's Exhibit.



and filed on May 26, 1976, charged Bernard Woodmansee, Sr., Jacky DuBray, Roy M. Hamlin, and Virginia Reynolds in three counts as follows:

Count I charged the defendants with the interstate transportation from New York to Vermont of stolen traveler's checks (18 U.S.C. § 2314) and aiding and abetting that transportation. (18 U.S.C. §§ 2)

Count II charged the defendants with receiving, concealing, storing, bartering and disposing of the traveler's checks (18 U.S.C. § 2315) and with aiding and abetting such actions. (18 U.S.C. § 2)

Count III charged the defendants with a conspiracy to commit the crimes charged in Counts I and II and listed eight overt acts committed in furtherance of the conspiracy. (18 U.S.C. § 371)

The trial of the defendants began on October 27, 1976 and on November 7, 1976, the jury returned the following verdicts: (Tr. 1388; DA 271)

Woodmansee - Guilty on all counts;

Hamlin - Guilty on all counts;

DuBray - Guilty on Counts II and III,  
Not guilty on Count I;

Reynolds - Not guilty on Counts II and III.\*

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\* The Court had earlier granted Reynolds' motion for judgment of acquittal on Count I. (Tr. 1054A)



On November 29, 1976 Judge Coffrin revoked Woodmansee's bail and remanded him into the custody of the United States Marshal pending sentence. (DA 14) On December 6, 1976 Judge Coffrin sentenced Woodmansee to the custody of the Attorney General for eight years on Counts I and II to be concurrent and four years on Count III to be consecutive to the sentence on Counts I and III, and denied Woodmansee's motion for release pending appeal. (DA 14)

On November 29, 1976 Judge Coffrin revoked Hamlin's bail and remanded him into the custody of the United States Marshal pending sentence. (DA 30) On December 13, 1976 Judge Coffrin sentenced Hamlin to concurrent terms of eight years on Counts I and II and four years on Count III and denied Hamlin's motion for release pending appeal. (DA 31) On January 21, 1977 Hamlin filed a motion for release in this court pursuant to Rule 9(b), F.R.A.P., which this Court denied on February 8, 1977.

On December 13, 1976 Judge Coffrin sentenced DuBray to concurrent terms of five years on Count II and three years on Count III. (DA 22)

STATEMENT OF ISSUES

- I. WHETHER, GIVEN THE TOTAL ABSENCE OF PREJUDICIAL PRE-TRIAL PUBLICITY, THE COURT ABUSED ITS DISCRETION IN DENYING MOTIONS FOR SEVERANCE AND CHANGE OF VENUE.
- II. WHETHER THE PROCEDURES USED BY THE DISTRICT COURT WERE ADEQUATE TO INSURE THAT A FAIR AND IMPARTIAL JURY WAS IMPANELED.
- III. WHETHER HAMLIN AND DuBRAY WERE SHOWN TO BE MEMBERS OF THE CONSPIRACY BY A FAIR PREPONDERANCE OF THE INDEPENDENT EVIDENCE.
- IV. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT.
- V. WHETHER THE COURT ABUSED ITS DISCRETION IN LIMITING CROSS-EXAMINATION OF MICHAEL CHURCHILL ON A MISDEMEANOR CONVICTION WHEN CHURCHILL'S CREDIBILITY AND POSSIBLE BIAS WERE ALREADY EXTENSIVELY BEFORE THE JURY.
- VI. WHETHER THE COURT ABUSED ITS DISCRETION IN DENYING DEFENDANTS' REQUESTS TO CHARGE WHICH INCORRECTLY STATED THE EVIDENCE AND THE LAW.



### STATEMENT OF FACTS

In the light most favorable to the Government, United States v. Marrapese, 486 F.2d 918, 921 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974), the jury could have found the following facts:

During the weekend of May 7-10, 1976 exactly twenty thousand dollars (\$20,000) in Bankamerica traveler's checks were stolen from the General Electric Company, Schenectady, New York. (Tr. 416-17; DA 179-180) An audit was conducted to determine the serial numbers of those checks. (Tr. 434; GX 8, 9).

On May 15, 1976 Michael Churchill placed a telephone call to Bernard Woodmansee as previously requested by Woodmansee. (Tr. 33) In their telephone conversation Woodmansee told Churchill that he (Woodmansee) didn't have anything yet but might have something for the following Friday (May 21) and that Woodmansee had to talk to Churchill personally about something for next Friday. (Tr. 40; DA 103; GX 1; GA 1)\*

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\* Although all tapes of telephone conversations between Churchill, Woodmansee and Reynolds were played for the jury both after their admission and later at the jury's specific request during deliberations (Tr. 1357-8), the trial judge did not feel that transcripts would be necessary for the jury. While these transcripts themselves were not admitted as evidence, defense counsel were provided the transcripts at trial and made no objection to their accuracy. The Government has included them in its Appendix for the convenience of the Court should any question of accuracy arise.



They arranged to meet in half an hour at a restaurant.

(Id.) Woodmansee met with Churchill for a period of time at the restaurant and then they both left in Woodmansee's car. (Tr. 40; DA 103; Tr. 446-7, 561-2)

They drove to defendant Reynolds' residence at 63 Susie Wilson Road in Essex Junction, Vermont. (Tr. 44-45)

During the ride Woodmansee spoke first and asked Churchill how many traveler's checks he could move, that is, turn into cash. (Tr. 41; DA 104) Churchill told him about \$20,000 worth. (Id.) Woodmansee said that he "had to be sure, because the guys he was getting it from. . . would do [them] in" if they didn't get their money. (Id.)

When they arrived at Reynolds' residence, Woodmansee told Reynolds to call Roy. (Tr. 45; DA 105) She called defendant Roy Hamlin at his residence in Glens Falls, New York. (Tr. 45, 820, 877; GX 49) Woodmansee told Hamlin that somebody was with Woodmansee, that Woodmansee needed "twenty tickets" and that Woodmansee and Churchill would cash in the traveler's checks. (Tr. 45; DA 105) Later, Woodmansee drove Churchill back to the restaurant to pick up his car. He told Churchill to call him early the following Friday. (Tr. 47; DA 107) Churchill called Woodmansee the following Friday, May 21st, but he wasn't home and Reynolds told him to call back if it was him. (Tr. 50; GX 2; GA 2)

Toll records showed three calls on May 15 at 11:15 P.M., May 17 and May 19 from co-defendant DuBray's residence in Albany, New York to Hamlin's residence (Tr. 804-5; GX 45, 46) and a call on May 18 from Hamlin's residence to Reynolds' house. (Tr. 807-8; GX 47, 48)



He then called Woodmansee. (Tr. 49, 65; DA 109; GX 2) When Churchill asked him if everything was set, Woodmansee told him that they weren't there yet but they would be there shortly. (Tr. 66-7; GA 3) Woodmansee also said that "it was going to be" and Churchill should not worry but come over to Reynolds' residence. (Id.) Churchill went over to Reynolds' residence. (Tr. 67, 455, 565) When Churchill got there, Woodmansee called defendant Hamlin (Tr. 68, 820; GX 49) and told Hamlin that they would be waiting for him. (Tr. 68) Woodmansee and Churchill left the house and returned a few hours later. (Tr. 69, 456, 568)

Soon after they returned, Woodmansee received a call from Hamlin or DuBray saying that they were nearly there and would be at the residence shortly. (Tr. 70) Woodmansee told Churchill to relax because they would be coming. (Tr. 71; DA 110) About one-half hour later Hamlin and DuBray pulled up in DuBray's car\*and entered Reynolds' residence where Woodmansee and Churchill were. (Tr. 456-7, 571-2, 602-3) Hamlin and DuBray had been seen coming from the south on Interstate 89 to Route 15. (Tr. 593-4, 628, 973-4) and then onto Susie Wilson Road. (Tr. 628) While waiting to turn onto Susie Wilson Road they constantly moved their heads back and forth. (Tr. 630)

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\* With New York registration. (Tr. 831; GX 50)

When Hamlin and DuBray walked into the house, Woodmansee introduced them to Churchill as Roy and Jack. (Tr. 71; DA 110) Then DuBray handed Woodmansee a brown bag full of traveler's checks. (Tr. 71-2; DA 110-1, 113-4; Tr. 332, 336) Woodmansee went to the bedroom briefly and then called Churchill to come in there. (Tr. 75; DA 114) In the bedroom Churchill saw the brown bag full of traveler's checks. (Tr. 75, 332, 336; DA 114) Woodmansee also had a stack of traveler's checks in his hands. (Tr. 75; DA 114) Woodmansee told Churchill that he was giving him four thousand dollars worth now and would have eight thousand more tomorrow after Churchill returned with the cash for the four thousand. (Id.) Woodmansee also told him to cash them by buying cartons of cigarettes which he would buy back from Churchill (Id.) and instructed Churchill on the manner of negotiating the checks. (Tr. 76; DA 115) Churchill then left and turned the traveler's checks over to state police and F.B.I. agents. (Tr. 77; DA 116) The four thousand dollars worth of checks were part of those stolen earlier from General Electric. (Tr. 77, 647-8, 710; DA 116; GX 4, 9, 34)

On May 22, 1976, the next day, Churchill called Woodmansee but Reynolds answered and told him to call Woodmansee at another number. (Tr. 79; DA 118; GX 3; GA 4) Churchill then called Woodmansee who had been waiting for his call all day. (Tr. 87; GX 3; GA 5) Churchill told him



the traveler's checks were all gone, Churchill had \$2,000 now and was getting the rest and would meet Woodmansee tomorrow, Sunday. (Id.) When Churchill said he would take "10" more, Woodmansee said that was alright because he wanted to get rid of these guys who were bugging him. (Id.) He promised Churchill "150 more of those big balloons next week" and ended by saying he "had to call somebody to get them off my back." (Id.)

The next day, Sunday, May 23rd, Churchill called Woodmansee at Reynolds' house. (Tr. 88-90; DA 120; GX 3; GA 6) They agreed to meet later that afternoon. (Id.) Woodmansee told Churchill that he would "bring 6" (\$6000) more to Churchill for him to turn into cash. (Id.) Woodmansee also told Churchill to make sure to work today (Sunday) too and agreed to tell Churchill that afternoon if the checks were too "hot" in Massachusetts. (Id.) Churchill then received \$3,900 in cash from the F.B.I. and went to meet Woodmansee. (Tr. 90, 463-4, 845) Meanwhile Woodmansee, Hamlin and DuBray who were at Reynolds' house all walked into the same bedroom Churchill had been in on Friday night (Tr. 362, 1015) and then left about 11:30 A.M. in a maroon car, license number EN 726 (Tr. 605) rented by Reynolds on May 21, 1976. (Tr. 875-6; GX 53)

Churchill arrived at the meeting place and waited until he was told by an F.B.I. agent that Woodmansee, Hamlin and DuBray were inside. (Tr. 91; DA 121) Woodmansee, Hamlin and DuBray had arrived about noon. (Tr. 785-6, 812-13) Churchill then walked into the restaurant where he was greeted by Woodmansee and possibly Hamlin. (Tr. 91, 787; DA 121) After Churchill told Woodmansee he had been waiting in the parking lot, Woodmansee stated to Hamlin and DuBray that they "aren't going to believe this" (Tr. 836-7) i.e., that Churchill had been waiting. Hamlin repeated to Woodmansee and DuBray that Churchill had been waiting (Tr. 837; DA 202) and told Churchill not to worry about it. (Tr. 91, 339; DA 121) One of the defendants said to Churchill that they were getting nervous. (Tr. 788)

All four then went into the lounge and Woodmansee and Churchill went to a curtained room. (Tr. 92; DA 122) Woodmansee started to hand Churchill more traveler's checks but did not do so because Churchill had to return to his car to get the money. (Id.) Churchill returned to his car, got the bag of money, and returned to the lounge. (Tr. 92, 577, 644, 789, 838; DA 122) Churchill gave Woodmansee \$3,900 in cash and received \$6,000



in traveler's checks in return. (Tr. 42; DA 122) Woodmansee gave Churchill two fifty dollar bills from the bag for gas. They then went out and sat with Hamlin and DuBray. (Tr. 93, 789) Woodmansee gave the bag of money to DuBray. (Tr. 93; DA 123) Woodmansee, Hamlin and DuBray agreed to meet Churchill the next day to exchange money for the remaining ten thousand dollars of traveler's checks. (Id.) Hamlin said that Churchill could come to Albany, New York where Hamlin would have \$50,000 more checks to cash. (Id.) Churchill then left. (Id.) The six thousand dollars in traveler's checks were exactly the same as those stolen from General Electric. (Tr. 467, 647-8; GX 5)

A short time later Woodmansee, Hamlin and DuBray got up to leave and DuBray paid the bar tab with money taken from the bag which Churchill had given to Woodmansee, (Tr. 791, 839), and which the F.B.I. had given to Churchill. (Tr. 849; GX 10, 51, 52) All three defendants got into Woodmansee's car at which time they were arrested. The brown bag full of money was found in the back seat where Hamlin was sitting. (Tr. 848, 858)

Later the same day a search warrant was executed on Reynolds' residence where another \$10,000 in traveler's

checks were found in the bedroom in a night table.  
where Churchill had received the checks from Woodmansee  
the previous Friday. (Tr. 74, 362, 913-4, 916, 933, 935,  
981-3) These checks were the remaining portion of those  
stolen from General Electric. (Tr. 986, 647-8; GX 9, 11A,  
11B, 34) When Woodmansee was incarcerated with Hamlin and  
DuBray after arrest, he shouted that the F.B.I. had moved  
too soon and should have waited. (Tr. 871)\*

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\* The Court properly instructed the jury that this was  
admissible only against Woodmansee. (Tr. 872)



## ARGUMENT

### I.

GIVEN THE TOTAL ABSENCE OF PREJUDICIAL PRETRIAL PUBLICITY, THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING MOTIONS FOR SEVERANCE AND CHANGE OF VENUE.

Rule 21(a) of the Federal Rules of Criminal Procedure provides in part as follows:

The court upon motion of the defendant shall transfer the proceeding as to him to another district . . . if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

Defendants made much of the claim that the prejudice against defendant Woodmansee, and therefor against the other defendants because of their association with him, within the District of Vermont was such that it was impossible for him and those to be tried with him to obtain a fair trial. (DB1 1; DB2 1; DB3 34) Defendants attempt to suggest that the publicity was so overwhelming as to require a transfer prior to the initiation of voir dire. In order for a juror to be allowed to sit on a criminal case, "[I]t is sufficient if the juror can lay aside his

impression or opinion and render a verdict based upon the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961). See United States v. Haldeman, 20 Cr. L. Rptr. 2104, 2105 (D.C. Cir. Oct. 12, 1976) (en banc), cert. denied, \_\_\_ U.S. \_\_\_ (1977). Defendants here are in effect asking this court to find that there was a presumptive prejudice which would have required that the case be transferred from the District of Vermont without the necessity of initiating voir dire. As noted by the United States Court of Appeals for the District of Columbia Circuit in Haldeman, however, the Supreme Court has reversed a conviction on such a presumption only in Rideau v. Louisiana, 373 U.S. 723 (1963)\*. All other cases which have considered this subject have concluded that voir dire is the appropriate vehicle for determining whether an impartial jury can be selected.\*\* 20 Cr. L. Rptr. at 2105.

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\* See United States v. Mandel, 415 F. Supp. 1033, 1066-69 (D. Md. 1976).

\*\* Defendants have attempted to show that they should not have been required to go through voir dire by means of two polls conducted by Dr. Frankovic. However, as noted in Haldeman, the trial judge sitting as a fact finder need not accept opinion poll testimony. Id.



Virtually any case which has considered the question of pretrial publicity has held that voir dire is where the determination should be made as to whether it is necessary to transfer the case from the district for trial. In this case the pretrial publicity as reflected in the material submitted to the district court in connection with defendant's motion for transfer, failed to make any such showing. It is particularly noteworthy here that none of the publicity is alleged to have been of a prejudicial nature in connection with the underlying case. See United States v. Persico, 425 F.2d 1375, 1380 (2d Cir.), cert. denied, 400 U.S. 869 (1970). Rather, almost all of the material went back several years to Woodmansee's past activities.

Defendants attempt to by-pass the need for voir dire through the use of the public opinion poll and the suggestion that jurors do not truthfully answer questions with respect to prejudice. However, this court has previously concluded that such an approach is not viable:

It must be assumed, if we would continue to rely upon the jury system, that the talesmen will answer truthfully as to their prejudices or lack thereof. It would indeed be a cynical approach to believe that jurors, who give their assurance that they can fairly and impartially decide the fact issues before them, would deliberately conceal deep prejudices. Despite the fact that every individual,



who enters the jury box, of necessity, must bring his own personality and point of view with him and "may not be exempt from the general feelings prevalent in the society in which they live," such individuals once they take their oath must be trusted to act as honest and impartial fact judges. If there be human frailty, "we must do as best we can with the means we have." United States v. Dennis, 2 Cir., 1950, 183 F.2d 201, 226, aff'd 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). See also United States v. Hoffa, 156 F.Supp. 495, S.D.N.Y. 1957.

Application of Cohn, 332 F.2d 976, 977 (2d Cir. 1964).

See United States v. Mandel, 415 F. Supp. 1033, 1076 (D. Md. 1976).

Defendants also have tried to lead this court to believe that the prejudice was so overwhelming that they could not obtain a fair trial; voir dire nevertheless was the approach the law required for making such a determination. See United States v. Haldeman, 20 Cr. L. Rptr. 2105; United States v. Ehrlichman, 546 F.2d 910, 916 n.8 (D.C. Cir. 1976); United States v. Harris, 542 F.2d 1283, 1294 (7th Cir. 1976); United States v. Chapin, 515 F.2d 1274, 1275 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); United States v. Dioguardi, 428 F.2d 1033, 1039-40 (2d Cir.), cert. denied, 400 U.S. 825 (1970); Application of Cohn, 332 F.2d 976, 977 (2d Cir. 1964);



United States v. Bletterman, 279 F.2d 320, 322 (2d Cir. 1960); United States v. Bando, 244 F.2d 833, 838 (2d Cir.), cert. denied, 355 U.S. 844 (1957); United States v. Moran, 236 F.2d 361 (2d Cir.), cert. denied, 352 U.S. 909 (1956); United States v. Mandel, 415 F. Supp. 1033, 1065-76 (D. Md. 1976); United States v. Mitchell, 372 F. Supp. 1239, 1259-61 (S.D.N.Y.) appeal dismissed, 485 F.2d 1290 (2d Cir. 1973).

The District Court here correctly went ahead with the voir dire, and as the Government will establish in the section which follows, found the panel of jurors to be relatively untainted. It is for precisely this reason that the voir dire approach is normally followed.



## II.

THE PROCEDURES USED BY THE DISTRICT COURT WERE ADEQUATE TO INSURE THAT A FAIR AND IMPARTIAL JURY WAS IMPANELED.

Defendants attack on appeal several aspects of the voir dire including the scope of the questions asked by the lower court of the panel of veniremen, the adequacy of the questions themselves, and, in effect, suggest a bias on the part of Judge Coffrin which resulted in an attempt by him to simply obtain bodies for a jury as opposed to selecting a fair and impartial jury.\*

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\* References to the Judge specifically attempting to do this (DBl 51-52); to the Judge as "Coffrin" (DBl 49); to the Judge having "reformed" the answers for jurors (DBl 40); to the Judge's "shoe-horning" of jurors (DBl 41, 48, 51, 52); to the Court "finally" posing a question in its (proper) form to a juror (DBl 41); to the Judge "conceding" to certain "individual jurors that the testimony of police officers could be expected in this trial and as the transcript shows the testimony of police officers played a prominent part in the trial;" (DBl 42); to the attempts by the Court to qualify juror Lagrow (DBl 52-53); when it is clear from a reading of the transcript that the Judge was aware that Lagrow was simply trying to avoid jury duty due to a business inconvenience (Tr. 191-96, 199-205). In this context defendant Woodmansee's statement that the Court "sincerely attempted" to conduct a proper voir dire seems inconsistent with the remainder of his brief on this point. (DBl 47)

References to "Tr." refer to the voir dire transcript (a separate volume) in this argument only. All other references in this brief refer to the trial transcript.



The Government submits that this approach results in an attempt by defendants to pick apart particular voir dire questions out of context of the entire examination. When the overall procedure in form and substance is examined in its entirety it becomes clear that Judge Coffrin was making a conscientious effort to be fair to the defendants and the Government and to carefully exercise his responsibilities.

One specific area which must be pointed out is defendants' claim that certain questions were not asked on voir dire. The Judge has wide discretion in the conduct of voir dire. E.g., United States v. Zane, 495 F.2d 683 693 (2d Cir.), cert. denied, 419 U.S. 895 (1974); United States v. Bowe, 360 F.2d 1 (2d Cir.), cert. denied, 385 U.S. 961 (1966). As is the case with respect to challenges for cause, the district court is in the best position to evaluate the juror's demeanor and determine which, if any, additional questions may be necessary. Cf. United States v. Ploof, 464 F.2d 116, 118 (2d Cir.), cert. denied, 409 U.S. 952 (1972); Mikus v. United States, 433 F.2d 719, 723 (2d Cir. 1970). An examination of the questions set out in defendant Woodmansee's requests show most went beyond any standard for voir dire and those



that were necessary were asked by the court in a different way if brought to the court's attention. Examples are the claims that the court covered the topic of the presumption of innocence and related matters without asking if the jurors agreed with it. This is not necessary however. United States v. Wooten, 518 F.2d 943 (3d Cir.), cert. denied, 96 S. Ct. 196 (1975). Even if it were necessary, defendants totally failed to note the numerous opportunities the judge provided for counsel to bring this to his attention through supplemental questions to be asked either of the panel as a whole or individual jurors or groups of jurors.\* Another example of this is defendants' claim that only certain jurors were asked about the weight to be given a police officer's testimony. (DB1 38-39) However after some jurors who had ties with police officers were asked questions of this nature the court inquired of counsel: "Are there any specific questions that counsel wish to have the court ask at this time."\*\* No request was made for any questions of the rest of the jurors on this subject.

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\* Tr. 38, 42, 45, 46, 60, 61, 65, 69, 85, 104, 107, 139-41, 144, 152, 160-61, 163-65, 180, 197, 215, 232, 234.

\*\* Tr. 31. Also, it has been held at least in some circumstances not to be error to refuse a properly requested construction with respect to the weight to be given the testimony of police officers. United States v. Golden, 532 F.2d 1244, 1247 (9th Cir. 1976); United States v. McGregor, 529 F.2d 928, 931 (9th Cir. 1976).



The failure of defendants to bring these additional questions to the court's attention constituted a waiver of any objection to the failure to ask those questions. See United States v. Colabella, 448 F.2d 1299, 1302 (2d Cir. 1971), cert. denied, 405 U.S. 909 (1972); United States v. Indiviglio, 352 F.2d 276, 280 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966).

Defendant also makes much of the nature of the questions asked by the district court, specifically the fact that defendant believed that an affirmative response was required to many of the questions. Judge Coffrin specifically explained however, that in instances where no response was necessary that the record would simply be blank in that respect. He also indicated that he looked at the jurors to see if they indicated any type of a yes or no answer. (Tr. 182-83; GA 25-26)

Under the circumstances the Government submits that the only question remaining is whether the jurors who were selected were fair and impartial. Defendants make reference to only three persons who ultimately sat as jurors, Johnson, Pratt and Grady, leaving it somewhat a mystery as to why defendants dismissed so many jurors who were challenged or excused, and for this reason specific reference is made only to those three individuals.



It appears that of the twelve jurors who decided this case only jurors Johnson and Pratt had ever heard of Woodmansee before.\* Juror Johnson's impressions of Woodmansee were only of having read his name in the paper and perhaps having heard it on television but nothing any more specific. (Tr. 35-36) Judge Coffrin questioned her concerning this and gave counsel an opportunity to ask additional questions. (Tr. 35-43; GA 16-24) Juror Pratt recalled reading about Woodmansee in the paper "years ago" about criminal activities but did not recall anything about what he had read and stated in response to thorough questioning by Judge Coffrin, that he could be fair and impartial. (GA 27-32) None of the defendants proposed additional questions (GA 31) of juror Pratt and did not see fit to either request a challenge for cause or make use of their remaining two preemptory challenges. (GA 32)

Additionally, defendants complain that in response to a specific question phrased in the disjunctive juror Johnson answered, "I believe I could serve." (DB1 39; Tr. 18) However, as was the case with juror Grady, none of the defendants asked to have this question clarified in any respect. (Tr. 38) No other juror who sat on the case had ever even heard of Bernard J. Woodmansee or any of the other defendants.

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\* Juror Grady made a reference to "other reasons" why she might not be able to determine the facts impartially. (Tr. 19) The answer is somewhat confusing as it appears in the transcript, and although defendants now complain of it, no request was made at the time for clarification. (DB1 39-40)



The Government does believe one final matter should be brought before the court in this respect however and that is the waiver of the two preemptory challenges by the defendants, while jurors Pratt and Johnson were on the panel.

Judge Coffrin initiated the jury selection procedures in this case by means of an order entered on October 20, 1976 (the selection of the jury commenced on October 27) which set out certain procedures for use during the trial. (GA 10-11) The order provided the defendants "jointly" [emphasis by the court] with an additional two preemptory challenges for a total of twelve as well as indicating that voir dire would be conducted by the court. (GA 10-11) Counsel were allowed to submit their proposed questions and an informal pretrial conference was set for 3:00 P.M. on October 26, 1976, the day prior to jury selection.

At the time of the informal pretrial conference on October 26, 1976 Judge Coffrin explained again the system of challenges with the defendants jointly being afforded twelve challenges. (Tr. A-1, 27; GA 12) The jury impaneling commenced at 9:50 A.M. on October 27, 1976 and following a luncheon recess concluded at 6:32 P.M. (Tr. 1, 242)\*

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\* Although it does not appear that the specific procedures used in the physical questioning and dividing up of the jurors were made part of the record, an examination of the transcript of the jury selection and specifically pages 34 and 35 shows that Judge Coffrin asked certain questions of the overall panel and then divided the panel between the petit and grand jury rooms with individual questioning of specific jurors in court whenever necessary.



It should be specifically remembered that the defendants were given twelve challenges jointly with the understanding that if they could not agree as to the challenges they would be broken down to three individually. This was specifically reiterated by Judge Cofrrin during the jury selection process. (Tr. 72; GA 33) While it is true that counsel for defendant Woodmansee on three occasions exercised challenges and that the two challenges which were waived were done by counsel for the other defendants, at no time was there any indication that the challenges were being exercised other than jointly.\*

Under the circumstances of challenges being exercised jointly, the Government submits that the strongest evidence of the impartiality of the voir dire is the two challenges

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\* At one point towards the end of the proceedings the following exchange took place:

THE COURT: Alright then we will have him retire and you fellows are ready to go on the challenges.

MR. KILMARTIN: I think we are. We want to visit on the preemptories now.

THE COURT: I thought you had. . .you spent quite a long time up there together. The defendants, as I understand it, waived both of their challenges at this juncture leaving the Government with one challenge at this time?

(Tr. 215-16 [the question was not answered as such but rather responded to by silence and the Government subsequently went forward with its next preemptory challenge]. (GA 31-32)



which were waived by the defendants. This alone suffices to dispose of the contention that the pretrial publicity was too massive to allow defendant Woodmansee and the others associated with him to have a fair trial and that the voir dire was inadequate to accomplish their needs. A further indication of the jury's ability to segregate the defendants is the acquittal of defendant Reynolds completely and of defendant DuBray on one count.

### III

HAMLIN AND DUBRAY WERE SHOWN TO BE  
MEMBERS OF THE CONSPIRACY BY A FAIR  
PREPONDERANCE OF THE INDEPENDENT EVIDENCE.

The Government introduced the following independent evidence at trial to show the involvement of Hamlin and DuBray in the conspiracy.

On May 15, 1976 co-defendant Woodmansee met with Michael Churchill. (Tr. 40, 446-7, 571-2; DA 103) They both returned to co-defendant Reynolds' house where Woodmansee made a call to the residence of Roy Hamlin, in Glens Falls, New York, at 5:07 P.M., reflected in the toll records of Reynolds' phone. (Tr. 45, 820; GX 49)

Toll records showed three calls on May 15 at 11:15 P.M., May 17 and May 19 from co-defendant DuBray's residence in Albany, New York to Hamlin's residence (Tr. 804-5; GX 45, 46) and a call on May 18 from Hamlin's residence to Reynolds' house. (Tr. 807-8; GX 47, 48)

On May 21st, Hamlin was seen driving DuBray's New York registered car on the Interstate to Reynolds' house where Woodmansee and Churchill were waiting. (Tr. 71, 593-4, 638, 973-4) DuBray was a passenger in that car. (Id.) As they neared the house, they both were acting in an, arguably, suspicious manner. (Tr. 630) They walked into the house and DuBray, in Hamlin's presence, handed Woodmansee a bag



full of traveler's checks stolen two weeks earlier from General Electric in Schenectady, New York. (Tr. 71-2, 332, 336; DA 110-1, 113-4) On May 22nd Churchill called Woodmansee. (Tr. 87; GX 3; GA 5)

On May 23rd Churchill called Woodmansee at Reynolds' house. (Tr. 88-90; DA 120; GX 3; GA 6) Shortly thereafter Hamlin and DuBray accompanied Woodmansee to Reynolds' bedroom where Churchill had seen the checks on Friday. (Tr. 362, 1015) All three then left for the Stockyard Inn. (Tr. 605)

When Churchill arrived at the Stockyard Inn, Hamlin told Woodmansee that Churchill had been waiting in the parking lot (Tr. 837; DA 202) and told Churchill not to worry about being late. (Tr. 91, 339; DA 121) One of the defendants said in the presence of Churchill and the other two that they had been getting nervous. (Tr. 788) After Churchill gave the F.B.I. money in a bag to Woodmansee and had received the additional traveler's checks, Woodmansee handed the bag of money to DuBray. (Tr. 93; DA 123) Hamlin, DuBray and Woodmansee then arranged with Churchill to exchange more checks for money on the next day. (Id.) Hamlin told Churchill, in DuBray's presence, that there would be fifty-thousand dollars in checks later and Churchill could come to Albany to work where Hamlin thought Churchill would like it (Id.) After Churchill left, DuBray paid the bar tab with cash taken from the bag. (Tr. 791, 839, 849; GX 10, 51, 52) Hamlin and DuBray with Woodmansee



were immediately arrested and the bag of F.B.I. money was found in the back seat of the car where Hamlin was sitting alone. (Tr. 848, 858) Ten thousand dollars worth of traveler's checks were subsequently recovered from the same bedroom in Reynolds' house where Churchill had seen the checks on May 21st. (Tr. 74, 362, 913-14, 916, 933, 935, 981-3

It is well established law in the Second Circuit that in a conspiracy trial the trial judge must find from independent evidence the existence of a conspiracy and the defendant's participation in it before hearsay statements of co-conspirators are admissible against him. United States v. Wiley, 519 F.2d 1348, 1350 (2d Cir. 1975); United States v. Cefaro, 455 F.2d 323, 326 (2d Cir. 1972). As the Second Circuit clearly indicated in United States v. Geaney, 417 F.2d 1116, 1120 (1969), the trial court may allow all hearsay statements of co-conspirators to come into evidence subject to the later proof under the appropriate standard of a conspiracy and the defendant's participation:

While the practicalities of a conspiracy trial may require that hearsay be admitted 'subject to connection,' the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in a conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of



the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt.

Accord, United States v. Stanchich, 550 F.2d 1294, 1297-8 (2d Cir. 1976); United States v. Cefaro, supra.

Therefore, to permit the jury to consider hearsay statements against the defendant the trial judge must find from the non-hearsay testimony at the close of all the evidence that a conspiracy existed and that the defendant was a part of it.

The Government submits that the independent evidence detailed above clearly was sufficient for the trial judge to find by a fair preponderance of the evidence that Hamlin and DuBray were members of the conspiracy. Although Judge Coffrin made his initial ruling after the testimony of Churchill and the representatives from General Electric (Tr. 428-9; DA 191-2), he specifically indicated that he would reverse his decision if the evidence so warranted:

At this time I would state for the record that I am satisfied by a fair preponderance of the evidence independent of the statements to which Mr. Churchill testified which defendants' counsel have characterized as hearsay, as to the existence of a joint criminal undertaking or conspiracy involving the defendants here on trial. In other words, I am satisfied that the United States has come forward with evidence independent



of those statements which supports the existence of a criminal conspiracy by a fair preponderance of the evidence. Accordingly, I am satisfied that those statements offered against the defendants to which counsel earlier objected were made during the course and in furtherance of a conspiracy and for that reason are not hearsay and are properly admissible in accordance with the provisions of Rule 801 (d)(2)(E) of the Federal Rules of Evidence. I am aware that the Government has not concluded its case as yet, and there is other evidence and the testimony of other witnesses yet to come. I am also aware that the defendants will undoubtedly cross examine the witnesses and carefully scrutinize any additional evidence other than testimony. Should anything occur during the balance of the Government's case which causes me to change the opinion which I have just stated, I shall do so and promptly advise the parties. In Advising the parties of my determination as to the admissibility of the statements, I am assuming, unless advised to the contrary, that each defendant objects to such determination even though I have reached such a determination independent of a motion to strike such statements as previously discussed. My determination is also made subject to the right of the defendants to move to strike the statement at any future time during the course of the trial if they believe the circumstances have changed sufficiently to warrant such a motion.

He never did reverse his decision and implicitly affirmed it by denying Hamlin's and DuBray's motions for acquittal after the Government rested. (Tr. 1031-1060 )\*

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\* Even if the trial judge did not make an explicit finding of a conspiracy when all the evidence was in, this court could still make that determination on appeal. United States v. Rosenstein, 474 F.2d 105, 713 (2d Cir. 1971).



Since the major part of the witnesses called by the Government after Michael Churchill were called to corroborate his testimony, there was no evidence to cause Judge Coffrin to reverse his decision.

Although both Hamlin and DuBray appear to contend basically that at worst they were in the wrong place at the wrong time, their contentions are contradicted by the evidence. The series of telephone calls, the transportation of the checks to Vermont, the transfer of the checks from DuBray to Woodmansee, the meeting with Churchill to get the money and the conversation of Hamlin and DuBray with Churchill about more traveler's checks is clearly sufficient to find that they were members of the conspiracy. In United States v. Calabro, 449 F.2d 885, 889-91 (2d Cir. 1971) this court found membership in a conspiracy merely from the defendant's presence at meetings with a Government informant and the doing of one act. The presence of Hamlin and DuBray at meetings with Churchill and Woodmansee, their actions and statements can reasonably be inferred to show complicity not coincidence. Calabro at 890.

Finally, if Hamlin and DuBray inferentially argue that hearsay statements made by co-defendant Woodmansee prior to their May 21st arrival should not have been admitted against them, such argument is without merit.



As stated above, there was sufficient evidence to find that they participated in the conspiracy. As such, statements of co-conspirators were admissible against them regardless of when they joined the conspiracy. United States v. Sansone, 231 F.2d 887, 892 (2d Cir. 1956). The evidence was clearly sufficient to find that Hamlin and DuBray were members of the conspiracy.



IV

THERE WAS SUFFICIENT EVIDENCE TO  
SUPPORT THE VERDICT OF THE JURY.

In addition to the independent evidence against Hamlin and DuBray\* which the Government has detailed in point III, supra, the jury could have properly considered the following statements and actions of co-conspirator Woodmansee.

On May 15 Woodmansee told Churchill that he had to see him personally about something for next Friday. (Tr. 40; DA 103; GX 1; GA 1) When Woodmansee met Churchill, he asked Churchill if he could "move" traveler's checks. (Tr. 41) Woodmansee said he was getting the checks from some "guys" who would hurt them if they didn't get their money. (Id.) Woodmansee told Reynolds' to call Roy and a call was made to Hamlin's residence in Glens Falls, New York. (Tr. 45, 820, 877; GX 49) Woodmansee ordered "twenty tickets" from Hamlin. (Tr. 45; DA 105)

When Churchill called the following Friday, Woodmansee said not to worry that everything was set and they would

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\* Defendant Woodmansee does not raise an argument of sufficiency of evidence in his brief.



be there shortly. (Tr. 66-7; GX 2; GA 3) and "it was going to be." (Id.) Woodmansee called Hamlin and told him that they would be waiting for him. (Tr. 68, 820; GX 49) A few hours later Woodmansee was called by Hamlin and/or DuBray who said that they would be there shortly. (Tr. 70) After Woodmansee gave the checks to Churchill, he explained to him how to negotiate the checks. (Tr. 76; DA 115)

On May 22, Woodmansee spoke with Churchill about the checks. (Tr. 87; GX 3; GA 5) Woodmansee wanted to get rid of the checks because Hamlin and DuBray\* were bugging him. (Id.) Woodmansee promised Churchill "150 more big balloons" next week (Id.) and Woodmansee would call somebody to get "them" off my back. (Id.) A meeting was set up for the next day. (Id.)

On May 23, Woodmansee told Churchill he would bring \$6,000 more in checks to the Stockyard Inn. (Tr. 88-90; DA 120; GX 3; GA 6) He told Churchill to work even today, Sunday, and said he would let him know if the checks were "too hot" in Massachusetts. (Id.) Hamlin, DuBray and Woodmansee then met with Churchill and exchanged the checks

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\* The jury could certainly infer from the previous calls to Hamlin and from the fact that Hamlin and DuBray arrived with the checks which DuBray gave to Woodmansee that "they" referred to Hamlin and DuBray.



for money; Churchill had conversations with all three about the negotiation of the stolen traveler's checks. (Tr. 92 et seq.)

Defendants\* argue, inter alia, that the fact that Woodmansee and Churchill left their presence on May 23rd to transfer money for checks at the Stockyard Inn is conclusive proof of their innocence. (DB2 12; DB3 10) However, anyone could have walked into the public lounge at anytime and rather than have all three defendants be seen with the checks and money in the lounge or go behind the curtained room with Churchill, only one would go.

Defendant Hamlin also argues that there was no evidence of transportation from Vermont to New York. However, the evidence did show that the checks were stolen in New York on May 7-10 and ordered from Hamlin in New York on May 15. Hamlin and DuBray came from New York on May 21st with Hamlin driving. DuBray gave the checks to Woodmansee in Hamlin's presence on the same date. Certainly on such evidence the jury could infer that Hamlin transported the checks to Vermont. See United States v. Coppola, 424 F.2d 991 (2d

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\* Counsel for Hamlin, however, states in his brief that while there was no evidence of his involvement in a conspiracy, he has no doubt that Woodmansee and DuBray were members of the conspiracy. (DB2 15)



Cir.), cert. denied, 339 U.S. 928 (1970); Isaacs v. United States, 283 F.2d 587 (10th Cir. 1960).

The evidence against both Hamlin and DuBray, as detailed in points III and IV of this Brief, clearly was "sufficient. . .from which the jury could properly find or infer, beyond a reasonable doubt, " that Hamlin and DuBray were guilty of the crimes for which they were convicted. United States v. Glasser, 443 F. 2d 994, 1006 (2d Cir.), cert. denied, 404 U.S. 854 (1971), quoting American Tobacco Co. v. United States, 328 U.S. 781, 787 (1946).



THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING CROSS-EXAMINATION OF MICHAEL CHURCHILL ON A MISDEMEANOR CONVICTION WHEN CHURCHILL'S CREDIBILITY AND POSSIBLE BIAS WERE ALREADY EXTENSIVELY BEFORE THE JURY.

A. Under Rule 608(b)

Michael Churchill testified on cross-examination by counsel for defendant Reynolds about his decision to cooperate after his arrest for a narcotics violation in March 1976. Churchill testified that since he believed he may have been close to being shot at the time of that arrest, he "did not want to ever have anything to do any more with drugs or nothing." (Tr. 239; DA 153) Later on recross by counsel for Hamlin Churchill said:

What I mean is that this was not going to get involved in any more criminal activities.

(Tr. 392; DA 164) At that time counsel for Hamlin tried to question Churchill about his New Hampshire misdemeanor conviction for resisting arrest sometime in April, 1976. Judge Coffrin in the exercise of his discretion provided for under Rule 608(b) FRE decided that such cross-examination would not be permitted. (Tr. 394; DA 166) Hamlin now contends that the Court committed reversible error in not permitting cross-examination under Rule 608(b) FRE.



A trial judge has "extensive discretion in controlling the scope and length of cross-examination," United States v. Kahn, 472 F.2d 272, 281 (2d Cir. 1973) and cases cited therein; Rule 611(b), and his exercise of discretion will not be disturbed unless it is clearly prejudicial. United States v. Blackwood, 456 F.2d 526, 529 (2d Cir.), cert. denied, 409 U.S. 863 (1972). This rule applies with "special force to recross, especially after a full and searching cross-examination." Kahn supra at 281. The evidence that counsel for Hamlin wanted to introduce concerned a misdemeanor conviction. Rule 608(b) by its clear language specifically excludes evidence of any conviction from being introduced as a specific instance of conduct. Counsel for Hamlin clearly could not introduce extrinsic evidence of the misdemeanor conviction under Rule 609(a) since resisting arrest is not a crime of dishonesty or false statement. Therefore, Hamlin attempted to use Rule 608(b) to ask Churchill about that conviction. Rule 608(b) provides that specific instances of conduct, in the discretion of the court and if probative of truthfulness or untruthfulness may be inquired into. However, a conviction for resisting arrest is not in itself probative of untruthfulness. Cf. United States v. Alberti, 470 F.2d 878, 882 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973), as it is certainly an assault-related offense.



Therefore, evidence of the conviction was not probative of untruthfulness under Rule 608(b) and in the exercise of the Court's discretion was properly excluded. See United States v. Kelley, 545 F.2d 619, 623 (8th Cir. 1976).

In any event the fact of the conviction was not at all inconsistent with Churchill's trial testimony. Churchill had testified that he did not want to become involved in drug-related criminal activity. (Tr. 239; DA 153) He never said that he was never arrested or convicted after March 12, 1976. The clear implication from his testimony was that his state of mind was to try to abstain from drug-related criminal activity. A misdemeanor conviction for resisting arrest would hardly have been consistent or inconsistent with that testimony. Cf. United States v. Bowe, 360 F.2d 1, 15 (2d Cir. 1966). The exclusion of the conviction could not have affected Churchill's credibility in any way since if Churchill denied it, the misdemeanor conviction could not be introduced either under Rules 608(b) (extrinsic evidence) or 609(a) (misdemeanor of dishonesty/false statement); and if Churchill admitted it, it would not contradict his testimony that he intended to avoid criminal activities. The conviction in no way was inconsistent with Churchill's state of mind at the time he made the statement, as Judge Coffrin held. (Tr. 395; DA 167)



All defense counsel had ample opportunity to impeach the credibility of Michael Churchill and, in fact, the Government in its direct case detailed his prior felony convictions as well as the agreement made with it for his cooperation. His credibility was extensively attacked by defense counsel including reference to a juvenile arrest. (Tr. 113-4) The trial judge did not abuse his discretion in excluding evidence of his misdemeanor conviction under Rule 608(b) for additional impeachment purposes. See Butler v. United States, 408 F.2d 1103, 1105 (10th Cir.1969 ); United States v. Gloria, 494 F.2d 477, 481 (5th Cir. 1974).

The cases cited by Hamlin are readily distinguishable. In United States v. Panebianco, 543 F.2d 447, 455 (2d Cir. 1976) death-threat evidence was allowed to be introduced by the Government to correct a possible distorted impression of credibility of a Government witness. (Id.) The defense had opened the door by eliciting a reference of the death threat. (Id.) However, in the instant case the credibility of Michael Churchill was thoroughly and forcefully examined by all defense counsel and the jury was given a clear picture of his credibility. It is difficult to understand how Hamlin can argue that the jury was left with a distorted impression of Churchill's credibility or motives. Again, even if the misdemeanor conviction had been admitted, it



would no have affected Churchill's credibility since he only stated that he did not want to be involved in any drug-related criminal activities again. In United States v. Corr, 543 F.2d 1042, 1051-2 (2d Cir. 1976) this Court affirmed even though it was troubled by the exclusion of evidence from a defense witness who testified to corroborate the testimony of Corr. 543 F.2d at 1052. The issue was not the impeachment of the witness himself but the limitation of evidence tending to corroborate the testimony of the testifying defendant. In the instant case Hamlin and DuBray presented no evidence so Churchill was not corroborating defense witnesses and the proposed cross-examination was intended to impeach Churchill himself not to support a specific defense raised by Hamlin and DuBray as in Corr. United States v. Kirk, 496 F.2d 947 (8th Cir. 1974) reaffirmed the considerable discretion of the trial court in deciding the extent of cross-examination, 496 F.2d at 949, and found no abuse of discretion in the limiting of cross-examination of the two Government agents who made an undercover drug purchase. Id. at 950. Defendant Kirk had argued that since she testified and presented a complete defense, she was entitled to broad cross-examination. This argument was rejected. Neither Hamlin nor DuBray presented any evidence.



The court clearly had discretion to exclude such testimony under Rule 608(b) and properly did so.



B. On the Issue of Bias.

Defendant Hamlin, relying on Rule 607 of the Federal Rules of Evidence, also contends that the cross-examination of Michael Churchill on the misdemeanor conviction should have been permitted on the question of bias. (DB2 26-27) It is difficult to understand how Rule 607 can be the basis for Hamlin's claim as it merely provides that "the credibility of a witness may be attacked by any party, including the party calling him." It is clear that Rule 607 is merely an abandonment of the traditional rule against impeaching one's own witness and thus is not relevant to this issue. See Advisory Committee Notes on Federal Rules of Evidence.

It is clear, as Hamlin concedes, that the misdemeanor conviction which Judge Coffrin excluded reference to on cross-examination did not involve dishonesty or false statement (resisting arrest). As such, evidence of that conviction is specifically excluded for impeachment purposes by Rule 609, FRE. Hamlin made no objection based on bias to the Court's ruling and relied on the statement by Woodmansee's counsel. (Tr. 396; DA 168) Hamlin now claims it was error to exclude cross-examination of Churchill on this misdemeanor in order to show bias. Hamlin claims that



cross-examination might have been able to show another consideration for Churchill's cooperation with the Government, although the Government denied that it had anything to do with the disposition of the New Hampshire misdemeanor conviction for resisting arrest. (Tr. 223-4,397)

It is well-settled that the scope of cross-examination is within the wide discretion of the trial judge, United States v. Blackwood, 456 F.2d 526, 529 (2d Cir.), cert. denied, 409 U.S. 863 (1972); United States v. Kaufman, 429 F.2d 240, 246 (2d Cir.), cert. denied, 400 U.S. 925 (1970); Rule 611, FRE, and should not be overruled unless there is a clear abuse of discretion with resulting prejudice. Blackwood, supra at 529. This wide discretion of the trial court includes the right to limit cross-examination on the issue of bias, United States v. Finkelstein, 526 F.2d 517, 529 (2d Cir. 1975), cert. denied sub nom Scardino v. United States, 96 S. Ct. 1742 (1976); United States v. Turcotte, 515 F.2d 145, 151 (2d Cir. 1975); United States v. Barnes, 368 F.2d 567 (2d Cir. 1966), especially when the bias or motive of the witness has already been fairly put to the jury. United States v. Mahler, 363 F.2d 673, 677 (2d Cir. 1966).

On direct examination the Government spent considerable time examining Michael Churchill on his prior felony criminal record (including four felonies), the exact nature



of the consideration for his cooperation with the Government (including the fact that it would make a recommendation to the sentencing judge on Churchill's drug conviction), that he hoped not to be jailed, and the particulars of Churchill's and his family's present support payments in the witness protection program. (Tr. 30-34, 94-96, 325-6, 402) All four defense counsel spent considerable time and effort probing Churchill on cross-examination about the exact nature of the agreement made with the Government and all considerations given to establish motive or bias. (Tr. 111-124, 151-55, 161-64, 180-83, 191-95, 211-15, 229-49, 253-54, 300, 349-51, 372-74, 390-93, 405-6) Churchill repeated that the agreement was exactly as outlined in his direct examination. There was absolutely no testimony from Churchill that the disposition of the New Hampshire misdemeanor charges were in any way related to any consideration for his testimony. All counsel clearly had adequate opportunity to cross-examine Churchill and to establish motive or bias for testifying.

The evidence clearly met the test in this Circuit that the jury be otherwise "in possession of sufficient information concerning formative events to make a 'discriminating appraisal' of a witness' motives and bias." United States v. Campbell, 426 F.2d 547, 549 (2d Cir. 1970);



accord, United States v. Blackwood, supra; United States v. Kelley, 545 F.2d 619, 623 (8th Cir. 1976). This Court recently affirmed this test in United States v. Turcotte, 515 F.2d 145, 151 (2d Cir. 1976) in failing to find an abuse of the court's discretion regarding limiting cross-examination when motive or bias was already before the jury. Certainly Churchill's possible motive for testifying was adequately before the jury and the jury was correctly instructed to consider in their deliberations Churchill's motive for testifying.\* (Tr. 1330; DA 213) United States v. Mahler, 363 F.2d at 677.

There was, additionally, no Brady material nor evidence at trial that the misdemeanor disposition was connected to any consideration for testifying and, therefore, cross-examination was properly limited. United States v. Finkelstein, 526 F.2d at 529.

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\* Hamlin's reliance on United States v. Miles, 480 F.2d 1215 (2d Cir. 1973) is not on point. In Miles there would have been absolutely no evidence of possible motive or bias if the evidence that the Government witness had been suspended from the police force had been excluded. In the instant case there was extensive other evidence of Churchill's possible motive or bias.



Also, since Churchill had already testified extensively on the extent of the consideration for his testimony, any testimony regarding leniency in the misdemeanor disposition would merely have been cumulative and properly within the court's discretion to exclude. United States v. Miller, 478 F.2d 1315, 1319 (2d Cir.), cert. denied, 414 U.S. 851 (1973).

VI

THE COURT'S INSTRUCTIONS TO THE JURY  
CORRECTLY STATED THE EVIDENCE AND THE LAW  
AND WERE NOT AN ABUSE OF DISCRETION.

A. Grand Jury Testimony

Hamlin contends that the trial court erred in failing to charge the jury that Churchill's grand jury testimony could be considered by them as substantive evidence. This contention rests upon a faulty interpretation of Second Circuit case law, Rule 801(d)(1)(A) of the Federal Rules of Evidence, and the evidence presented at trial.

Prior statements by a witness may be considered as substantive evidence at trial only under certain conditions. According to Rule 801(d)(1)(A), the witness must be subject to cross-examination at trial concerning the statement, the statement must have been given under oath subject to the penalties of perjury, and it must be inconsistent with his testimony. This Circuit has held, since United States v. DeSisto, 329 F.2d 929 (2d Cir.), cert. denied, 377 U.S. 979 (1964), that a witness' grand jury testimony, if inconsistent with his trial testimony might be given substantive effect. See United States v. Blitz, 533 F.2d



1329 (2d Cir. 1976); United States v. Jordano, 521 F.2d 695 (2d Cir. 1975); United States v. Rivera, 513 F.2d 519 (2d Cir.), cert. denied, 96 S. Ct. 367 (1975). Clearly then, the prior statement must contradict the witness' present story on the stand, Desisto, supra, or the witness must be regarded in some way of having disowned his grand jury testimony. United States v. Klein, 488 F.2d 481, 483 (2d Cir. 1973), cert. denied, 419 U.S. 1091 (1974).

The portion of Churchill's testimony upon which Hamlin focuses in an attempt to find inconsistency does not support his argument. At trial, Churchill testified about several meetings with the defendants, one of which took place on May 23, 1976. (Tr. 90 et seq; DA 120 et seq) Present at the May 23rd meeting with Churchill were Woodmansee, Hamlin and DuBray. (Tr. 91-92; DA 121-2) After having a drink (Id.) Churchill and Woodmansee stepped into a small private room and exchanged cash for traveler's checks. (Tr. 92; DA 122)\* They returned to the main room, where Hamlin and DuBray waited, and all discussed meeting the next day "at the Hotel Coolidge at White River," where a further exchange would take place. (Tr. 93; DA 123)

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\* Churchill noted that he had to return to his car for the cash before this transaction was completed. (Tr. 92)



Hamlin stated he would have more checks later. (Tr. 93; DA 123)

Churchill's grand jury testimony, while considerably less detailed than his trial testimony, is hardly contradictory. Churchill testified before the grand jury that he met with Woodmansee, Hamlin, and DuBray on May 23, 1976. At that meeting, he exchanged cash for traveler's checks with Woodmansee and then arranged to meet with the defendants the next day at the Hotel Coolidge in White River. (Tr. 206-7; DA 150-1; Tr. 93; GA 34-35)

According to Hamlin, the inconsistency is found in Churchill's failure to mention to the grand jury Hamlin's statement that he would have more checks later. This contention is without merit for several reasons.

First, the purpose of Churchill's grand jury testimony was to establish probable cause for an indictment. His references to the May 23rd transaction established time and place, indicated who was present, and outlined what happened without detail. Under the circumstances, nothing further was needed. There is no requirement that all the evidence in a prosecutor's possession be presented to a grand jury in order to obtain an indictment. United States v. Addonizio, 313 F. Supp. 486 (D.N.J. 1970), aff'd.,



451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936 (1972). That the Government chose not to elicit certain details from Churchill when he appeared before the grand jury is not a basis for finding inconsistency on Churchill's part.

In addition, there is no question that Hamlin knew of other pre-trial de-briefing statements by Churchill that were essentially identical with those made at trial. (Tr. 102 et seq., 150, 157, 179, 339, 404, 408)

Churchill stated on redirect at trial that he provided details of his conversations with defendants to the F.B.I. in a "debriefing" right after the May 23d meeting (Tr. 338-9). Copies of these "debriefing" statements were provided to all defendants as Jencks Act material. Thus, they were aware when Churchill testified that he would relate in some detail the conversations at each meeting.

There was no indication at the trial that Churchill's testimony was the product of a state of mind or a set of beliefs inconsistent with what defendants knew he had stated earlier. See Weinstein, Evidence, 801-76. There was no indication that he had changed his story in any way, or that he denied either making the earlier statements or their truth. The only difference noted at trial was that Churchill's testimony was more detailed.

Churchill's grand jury testimony was brief in comparison to his trial testimony; the absence of elaboration from the former does not make it inconsistent with the latter. This is especially so when defendants were clearly aware that Churchill had made statements concerning conversations with Hamlin at an earlier time. Since Churchill's trial testimony was not inconsistent with his grand jury testimony, Rule 801(d)(1)(A) does not come into play at all, and the judge properly did not instruct the jury on this point.

Further, it should be pointed out that in spite of Hamlin's reference to requested instructions in his brief (DB2 28) neither he nor DuBray submitted any written request that the judge charge the jury concerning use of Churchill's grand jury testimony.\* This alone could have been sufficient for the court to deny the request. United States v. Gonzalez-Carta, 419 F.2d 548, 552 (2d Cir. 1969)\*\*

In any case, even if the statements had been inconsistent, the absence of an instruction on this point would not be

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\* Hamlin's and DuBray's requested instructions on witness' credibility are included in GA 7-8 and GA 9 respectively.

\*\* Although Hamlin claims that the pretrial order in this case made Woodmansee's objection sufficient for all counsel (DB2 28), the order referred only to objections made to a witness' testimony at trial. (GA 11)



reversible error. Churchill's grand jury testimony was referred to by both the Government and the defense. (Tr. 206, 265-6, 338-9, 400) Any contradictions contained therein were fully exposed to the jury. They were never instructed not to consider the earlier statements as affirmative evidence. They were told to consider inconsistent statements when evaluating witness' credibility. (Tr. 1329-30; DA 212-13) Thus, the jury was left free to disbelieve Churchill's trial testimony inculcating Hamlin. See United States v. Gonzalez-Carta, 419 F.2d 548, 552 (2d Cir. 1969). In light of this, Hamlin cannot claim prejudice.

B. Possession

In his charge to the jury on Count I Judge Coffrin gave the following instruction regarding possession:

With respect to this first element, you must find that such defendant travelled from the State of New York to the State of Vermont on or about the date charged in the indictment, with the securities in his possession. I charge you now that traveler's checks are, in fact, securities.

Possession as used here can be either actual or constructive. Actual possession means that a person knowingly has manual or physical control or custody of the securities, that is, the securities are in his personal possession. However, even if you find that a person transporting the securities did not actually possess the securities while transporting them, this element of the offense is satisfied if you find beyond a reasonable doubt that the person had constructive possession of the securities. A person has constructive possession of securities if he has the power to exercise dominion and control over them.

With respect to the first element, the Government must establish that the defendant acted knowingly and willfully in transporting the securities in interstate commerce.

(Tr. 1333-4; DA 216-17)

The court instructed the jury similarly on Count

II:

First: That on or about May 21, 1976, the defendant whose guilt you are considering, received, concealed, stored, bartered, sold or disposed of traveler's



checks in interstate commerce, or that the defendant aided and abetted such acts. You may find that the defendant 'received' securities if you believe beyond a reasonable doubt that he accepted or took them into his possession or control.

The possession involved here may be either actual or constructive, as I explained those terms to you briefly.

(Tr. 1340; DA 223)

Initis earlier argument on the sufficiency of the evidence against Hamlin and DuBray (Points III and IV, supra) the Government has attempted to clearly delineate the extent of the evidence against them. The jury could certainly have found that the traveler's checks were ordered by Woodmansee from Hamlin who agreed to deliver them on May 21, 1976. Hamlin drove DuBray's car from New York to defendant Reynolds' residence where DuBray and Hamlin walked in together and DuBray, in Hamlin's presence, gave the brown bag full of the stolen traveler's checks to Woodmansee who took them to the bedroom. Two days later Hamlin and DuBray entered the same bedroom where Woodmansee had given the checks to Churchill. After that they left for the Stockyard Inn where more checks were exchanged for money from Churchill. There Hamlin told Churchill, in DuBray's presence, to come to Albany where Hamlin would have more checks for him to "get rid of." DuBray upon

leaving paid the bar tab from the Government money given by Churchill to Woodmansee.

Hamlin and DuBray, by incorporation, citing United States v. Infanti, 474 F.2d 522 (2d Cir. 1973), now contend that the failure of the court to charge that presence is insufficient to infer actual or constructive possession was error. Hamlin also contends that Judge Coffrin indicated that he would give Hamlin's instruction. However, the record clearly indicates the opposite:

I will charge that possession means either physical possession or actual or constructive possession. Well, that is the way I am covering possession, both actual and constructive, I'm not specifically with reference to any persons in a room or automobile, with reference specifically to Mr. Hamlin, except he is one of the defendants.

(Tr. 1184)        The Court specifically indicated that no mention of being in a room or automobile would be made. There was clear evidence that Hamlin was in constructive possession of the checks and knew that they were stolen.\*

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\* DuBray's same argument is obviously frivolous since the evidence was clear that he had actual possession of the checks (Tr. 71; DA 110) and knew that they were stolen. (Tr. 93, DA 123) DuBray was somehow acquitted of the transportation count. (Tr. 1388)



The jury could certainly have reasonably found that Hamlin had the "final say as to their means of transfer or that he was able to assure their delivery." United States v. Infanti, 474 F.2d 522, 526 (2d Cir. 1973). Hamlin's reliance on the holding in Infanti is misplaced. In Infanti the only evidence against co-defendant Kurtz was his presence in a hotel room with Infanti and his prior and subsequent travel with Infanti. 474 F.2d at 526. This court found that this was insufficient to find that Kurtz had actual or constructive possession of the stolen securities. Id. Since this court found knowledge that the securities were stolen could not be inferred from possession (since Kurtz had no actual or constructive possession), the court reversed because there was no other evidence of knowledge. This court was very careful to point out that Kurtz was not ultimately charged as a conspirator nor an aider and abettor. Id. However, Hamlin and DuBray were both charged and convicted as conspirators and aiders and abettors. From the evidence against Hamlin as delineated in points III and IV, supra, of the Government's Brief the jury would reasonably find that ~~they~~ knew the checks were stolen and transported them from New York to Vermont in DuBray's car that Hamlin was driving. DuBray clearly had actual possession of the checks



as he gave them to Woodmansee. (Tr. 73-4; DA 112-3)  
The jury could reasonably find that Hamlin had constructive possession of the checks since the evidence of his conversation with Woodmansee showed Hamlin had control over their disposition, a clear indicia of constructive possession as stated in Infanti, supra at 526. That fact coupled with clear evidence of Hamlin's guilty knowledge certainly contained evidence of more than mere presence.

Since there was ample evidence of guilty knowledge of Hamlin and DuBray and participation in the transportation and disposal of the traveler's checks and no evidence of mere presence,\* the trial judge correctly instructed the jury on the issue of possession and did not abuse his discretion. United States v. Grunewald, 233 F.2d 556, (2d Cir.), rev'd. on other grounds, 355 U.S. 391 (1956).

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\* Neither Hamlin nor DuBray presented any evidence at the trial. (Tr. 1070)



CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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June 8, 1977

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

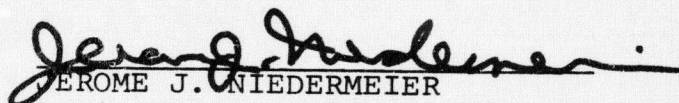
v.

Docket No. 77-1022,  
1023, 1024

BERNARD WOODMANSEE, SR.,  
JACKY E. DuBRAY and  
ROY M. HAMLIN

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of June, 1977, mailed two copies of the attached Brief and Appendix to Duncan F. Kilmartin, Esq., Michael Kupersmith, Esq., and James D. Linnan, Esq., counsel for Appellants, postage prepaid.

  
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